Law & Inequality: A Journal of Theory and Practice

Volume 26 | Issue 2 Article 4

2008

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On the morning of January 24, 2002, the Olympic torch was carried through the streets of Juneau, Alaska, en route to the winter games in Salt Lake City, Utah.[1] Juneau-Douglas High School let its students out early to enjoy the event, and they lined both sides of the street, scuffling, joking around, and waiting for the torch to come by.[2] As it did, Senior Joseph Frederick and a few of his friends "unfurled a 14-foot banner bearing the phrase: 'BONG HiTS 4 JESUS.'"[3]

* * *

A few months before the congressional elections of 2004, an anti-abortion group ran a radio advertisement called "Wedding."[4] The ad envisioned a couple at the altar, with the father of the bride interrupting the ceremony to talk about how to put up drywall.[5] This ad and others entitled "Loan"[6] and "Waiting"[7] exhorted Wisconsin voters to contact their incumbent senators to oppose the filibuster of judicial nominees with the tagline,

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†. J.D. expected 2009, University of Minnesota Law School; B.A. 1996, University of Wisconsin. I would like to express my appreciation for the guidance given to me by Professor Heidi Kitrosser as well as *Law and Inequality: A Journal of Theory and Practice*, especially Nora Sandstad, Lizzie Smith, Mary Boatright, and Sara Sampsell-Jones and her editing staff. Additionally, I would like to thank my father Michael Davis for instilling in me a passion for civil rights, equality, and politics (beginning at age two months, watching the resignation of Nixon together on the sofa), and my mother Elisabeth Bridge for encouraging me to follow in her footsteps to pursue a career in law.

The title of this article quotes *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2699 (2007) (Souter, J., dissenting), arguing that the majority opinion inverts the reasoning of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

1. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
2. *Id.*
3. *Id.*
4. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2660 (2007).
5. *Id.*
6. *Id.* at 2661 n.2.
7. *Id.* at 2660 n.3.

"sometimes it's just not fair to delay an important decision."[8]

* * *

What do these two scenarios have in common? On the same summer day of June 25, 2007, the United States Supreme Court, newly under the direction of Chief Justice John Roberts, released two opinions that addressed these two sets of facts.[9] In *Morse v. Frederick*,[10] the Court found that, given a government interest in preventing drug abuse among minors, the school could forbid Frederick's banner.[11] In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[12] the Court determined that, while Congress has a compelling interest in stamping out electoral corruption,[13] campaign finance reform laws could not place limits on the timing of "Wedding" and its sister issue ads because they did not expressly advocate for one candidate or another.[14] Therefore, the Court found that the ads could "not possibly" contribute to the problem of political corruption.[15]

While grounded in different precedent, both *Morse* and *Wisconsin Right to Life, Inc.* address free speech issues governed by the First Amendment of the Constitution.[16] Stripped of the special circumstances governing school speech on the one hand and campaign speech on the other, together, the two cases stand for the striking proposition that a political organization can speak more powerfully than a natural person in the contemporary America.

How did the Court come to this result? In these cases, the Court employed precedent selectively, picking the cases it wished to rely on and distinguishing those that did not fit—to preserve the speech rights of the moneyed but deny the same rights to the unimpowered.[17] The Court relied on these special circumstances to frame the issues in the respective cases in initial terms that necessitated their end results. By focusing on the individual facts of cases and ignoring the purpose of the First Amendment, the Court missed the forest through the trees.[18]

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8. *Id.* at 2660.
9. *See id.* at 2652; Morse v. Frederick, 127 S. Ct. 2618, 2618 (2007).
10. 127 S. Ct. 2618.
11. *Id.* at 2625.
12. 127 S. Ct. 2652.
13. *Id.* at 2672.
14. *Id.* at 2673.
15. *Id.* at 2672–73.
16. *Id.* at 2673; *Morse*, 127 S. Ct. at 2625.
17. *See infra* Part III.
18. *See infra* Part III.

This Article maintains that the Court was wrong in finding for the speaker in *Wisconsin Right to Life, Inc.* but not for the speaker in *Morse*; the speech rights of an individual should not be constrained when those of a state-created, moneyed organization are allowed to run rampant. The Roberts Court used precedent formalistically to preserve the speech rights of powerful political groups and to deny them to the unimpowered, thereby flouting the greater purpose of the First Amendment. This Article focuses on the Court's treatment of campaign electioneering in *Wisconsin Right to Life, Inc.*, and it highlights *Morse* to show the Court's inconsistent and disturbing treatment of individuals' versus political organizations' speech rights. Part I of this Article discusses the Court's historical approach to free speech jurisprudence, notes the special circumstances carved out for different kinds of speech, and reviews the history of both school and campaign speech law. Part II shows that the Court's formalistic reasoning led to erroneous conclusions in *Wisconsin Right to Life, Inc.* It also shows that in *Morse* the same pattern was used to reach paradoxical results. Part III posits a different view of free speech rights that, if adopted, could reconcile the inconsistencies in the Court's interpretation of free speech rights for different parties. It further demonstrates how adoption of these views would resolve the problematic subversion of individual rights to those of political organizations.

I. The First Amendment Introduced

A. *The History of Free Speech*

Despite its founding-day origins, the Court did not address the issue of free speech in earnest until the twentieth century.[19] The first cases to address the constitutionality of limits on expression largely focused on the rights of politically active individuals and relatively small groups of such individuals;[20] thus,

19. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 11 (2d ed. 2003) (noting that the Supreme Court did not give serious attention to the issue of freedom of speech until the early-twentieth century).

20. *See* David Kairys, *Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 237, 237–38 (David Kairys ed., rev. ed. 1990) (noting that the labor movement was a main actor in promoting free speech laws); *see also* Whitney v. California, 274 U.S. 357, 357–58 (1927) (finding that a man who attended meetings of Communist Labor Party was guilty of "criminal syndicalism"); Abrams v. United States, 250 U.S. 616, 624 (1919) (holding that incendiary pamphlets tossed to factory workers about the use of the munitions they produced violated the law); Schenck v. United States, 249 U.S. 47, 47–48 (1919) (holding that anti-draft leaflets sent to potential draftees violated the law).

the speeches of the soapbox speaker came to epitomize what should be protected.[21]

As such, the right to free speech was that of the citizen against government action—providing what some have termed a "shield," protecting the autonomous right to speak against the unconstitutional intrusion of the government.[22] In this context, the Court would come to find that the speech of individuals generally is protected from government interference regardless of content, unless it falls within a rather large group of enumerated exceptions.[23] Otherwise, the content of the message is, in principle at least, ignored.

In addition to actual speech, conduct that can communicate a message ("symbolic speech") is generally protected. For instance, the burning of the flag, though highly offensive to many Americans, has been deemed protected.[24] Likewise, the spending of money to disseminate a message has been equated with speech and, subject to certain restrictions, is also protected.[25]

In many decisions over the years, the Court upheld "content-neutral"[26] laws, but it struck down laws that discriminated against viewpoints[27] and expanded the definition of "free speech" to further open the "marketplace of ideas."[28] More speech was necessarily better since it contributed to the back-and-forth of democratic

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21. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986) ("For the most part, the Free Speech Tradition can be understood as a protection of the street corner speaker.").

22. *See id.* ("[T]he First Amendment is conceived of as a shield . . . protecting the individual speaker from being silenced by the state."); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 110 (2004) ("[T]he First Amendment affords a formal, negative shield against government action that limits any speech . . .").

23. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–85 (1992) (noting that content-based regulations are presumptively invalid but that some categories of speech, such as obscenity, defamation, and "fighting words," can be regulated because of limited social worth).

24. United States v. Eichman, 496 U.S. 310, 315 (1990) (citing Texas v. Johnson, 491 U.S. 397, 405–06 (1989) for the proposition that flag burning is protected expressive conduct).

25. Buckley v. Valeo, 424 U.S. 1, 16–17 (1976).

26. See Farber, *supra* note 19, at 21–38 (discussing the content distinction approach to First Amendment doctrine).

27. *See id.* at 21–38.

28. *See, e.g.*, Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 964–65 (2007) (stating that Justice Brennan, concurring in *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965), was the first justice to write about John Stewart Mill's "market place of ideas").

debate.[29] This urge to widen the bounds of protected discourse naturally resulted in the extension of First Amendment protections to state-created entities, such as corporations.[30]

In the 1940s, the Court determined that corporate speech in the form of advertising was not protected by the First Amendment;[31] however, the Court set out a new path in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[32] holding that it was not the identity of the speaker but the speech itself that was determinative.[33] As an initial matter, the Court found that the economic motivations of actors do not necessarily remove their speech from the sphere of free speech protection.[34] Additionally, given the free-market nature of the economy, the Court held advertising to be in the public interest because it informs the public of its choices.[35] However, commercial speech will be subject to government regulation where there is a substantial countervailing interest at play.[36] Because it is the speech that is protected, not the speaker, corporations can even perform the "speech act" of spending money without an overt self interest—including spending money on political speech.[37]

B. Regulation of Speech

Certain categories of speech, such as obscenity, fighting words, and libel, are "unprotected speech."[38] As a general rule, content-based restrictions on speech are prohibited.[39] Content-neutral restrictions, on the other hand, are generally permissible if they, for example, regulate the time, place, and manner of the

29. *See* Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 108–09 (2005) (noting that both advocates and detractors of campaign finance reform appear to endorse the idea "that more speech is always better").

30. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978) (establishing speech rights for corporate bodies and holding that the worth of speech does not depend on the identification of the speaker).

31. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

32. 425 U.S. 748 (1976).

33. *Id.* at 761–62.

34. *Id.* at 762.

35. *Id.* at 764.

36. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

37. First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978).

38. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("[Some] areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) . . . .").

39. Farber, *supra* note 19, at 25–26.

speech.[40]

> [T]here seems to be two clearly established exceptions to the rule of content neutrality, and at least one other possible exception. . . . One exception . . . is for compelling government interests. . . . A second well-established . . . exception covers speech with some nexus to government operations. . . . A third . . . may cover regulations with a sufficiently long historical pedigree.[41]

1. School Speech

Balancing students' rights with the government interest in developing an educated and law-abiding citizenry[42] has always marked school speech as a niche area of First Amendment law. Here, speech is limited as it is in other state-run, custodial institutions, such as prisons and the military.[43] Although public school students had spectacularly few constitutional rights until the genesis of First Amendment jurisprudence in the early-twentieth century,[44] the ensuing years resulted in some freedoms in the speech acts allowed to public school students, but recently, also some curtailments thereof.

a. Precedent: Tinker, Fraser, Kulmeier, *and* Vernonia

The strongest statement of First Amendment protection for student speech came in the context of Vietnam War protest.[45] In *Tinker v. Des Moines Independent Community School District*,[46] a group of students were suspended for wearing black armbands to school in protest against the Vietnam War.[47] The Warren Court recognized the "need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental

40. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

41. FARBER, *supra* note 19, at 32–33.

42. Anthony B. Schutz, *Public School Restrictions on 'Offensive' Student Speech in* Boroff v. Van Wert City Board of Education, *220 F.3d 465 (6th Cir. 2000): Has* Fraser*'s 'Exception' Swallowed* Tinker*'s Rule?*, 81 NEB. L. REV. 443, 444 (2002) (noting "ongoing struggle" to balance rights and interests).

43. FARBER, *supra* note 19, at 193.

44. *See supra* Part I.A (discussing early history of free speech); *see also* David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002) ("For most of the Twentieth century, public school students possessed little, if any, free-speech protections.").

45. Hudson & Ferguson, *supra* note 44, at 185–86.

46. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

47. *Id.*

constitutional safeguards, to prescribe and control conduct in the schools."[48] It also held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[49] and that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[50] The Court noted that the students' actions were not disruptive and not of the type that would "intrude . . . upon the work of the schools or the rights of other students,"[51] and it noted that the school district's actions were taken because it wanted to "avoid . . . controversy."[52] As such, the Court held that to justify an action to stifle student speech, a school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"[53] rather than just an "undifferentiated fear or apprehension of disturbance."[54] As the school district had made no such showing, its actions were found unconstitutional.[55]

If *Tinker* was the apex of student speech rights, the 1986 case of *Bethel School District No. 403 v. Fraser*[56] may well have been its nadir (prior to the 2007 *Morse* decision). *Fraser* concerned a speech given by a high school student at an assembly in which he employed "an elaborate, graphic, and explicit sexual metaphor" that spurred on "hoot[ing] and yell[ing]" in the crowd, as well as obscene gestures; some students were apparently embarrassed or confused by the speech.[57] The Court, under Chief Justice Burger, upheld the student's suspension, expressly distinguishing *Tinker*, which it noted concerned symbolic speech that did not interfere with school work or infringe on the rights of other students.[58] Asserting that the speech was not only "lewd and obscene"[59] but also "plainly offensive,"[60] the Court stated that it is "[s]urely . . . a highly appropriate function of public school education to prohibit

48. *Id.* at 507.
49. *Id.* at 506.
50. *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
51. *Id.* at 508.
52. *Id.* at 510.
53. *Id.* at 509.
54. *Id.* at 508.
55. *Id.* at 514.
56. 478 U.S. 675 (1986).
57. *Id.* at 678.
58. *Id.* at 680 (citing *Tinker*, 393 U.S. at 508).
59. *Id.*
60. *Id.* at 683.

the use of vulgar and offensive terms"[61] and that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults . . . ."[62] Thus, the Court held, fairly broadly, that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[63]

Two other noteworthy cases in considering the speech issues raised in *Morse*: *Hazelwood School District v. Kuhlmeier*[64] and *Vernonia School District 47J v. Acton*.[65] In *Kuhlmeier*, the Court addressed the censorship of student-written articles on teen pregnancy in a school-sponsored newspaper.[66] The Court expressly distinguished the case from *Tinker*, stating that *Kuhlmeier* did not deal with barring expression per se, but rather with whether a school must "affirmatively . . . promote" student speech.[67] The Court held that a school may control speech that "the public might reasonably perceive to bear the imprimatur of the school."[68] *Vernonia* was not a free speech case at all, but rather it dealt with Fourth and Fourteenth Amendment concerns, to wit, the mandatory drug testing of student athletes.[69] Importantly, the Court recognized that deterring drug use is an "important—indeed, perhaps compelling" interest of the state,[70] and that in the narrow factual situation presented, drug testing was constitutional.[71]

b. Morse v. Frederick

The Principal of Juneau-Douglas High School Deborah Morse suspended Joseph Frederick for displaying a banner that read "BONG HiTS FOR JESUS" at a school-sponsored event.[72] She

61. *Id.*
62. *Id.* at 682.
63. *Id.* at 683.
64. 484 U.S. 260 (1988).
65. 515 U.S. 646 (1995).
66. *Kuhlmeier*, 484 U.S. at 262–65.
67. *Id.* at 270–72.
68. *Id.* at 271.
69. *Vernonia Sch. Dist. 47J*, 515 U.S. at 648–52.
70. *Id.* at 661.
71. *Id.* at 665.
72. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007). Frederick's counsel attempted to argue that, as an optional activity off of school property, Frederick's speech should not be considered school speech. *See* Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *5 (D. Alaska May 29, 2003). Every court, however, held that it was a school speech case. *See id.*; *Morse*, 127 S. Ct. at 2622; Morse v. Frederick, 434 F.3d 1114, 1117 (9th Cir. 2006).

said she did this because she interpreted the banner to promote illegal drug use in violation of school policy,[73] which "specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors."[74] Frederick administratively appealed the suspension through school district processes, but the superintendent of schools ultimately upheld Principal Morse's decision because Frederick's banner contained a "message promoting drug usage in the midst of a school activity."[75] According to the superintendent, the message was not political speech because it did not "advocat[e] the legalization of marijuana."[76] Moreover, the banner was "potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission" to dissuade drug use.[77]

For his part, Frederick asserted that he "had been increasingly bothered by the lack of attention to the issue of freedom of speech in the United States generally and at [his high school] in particular."[78] At one point, he had been told by an assistant principal that he would be suspended if he did not stand for the Pledge of Allegiance.[79] Further, Frederick stated: "Bong Hits 4 Jesus was never meant to have any substantive meaning. And it was certainly not intended as a drug or religious message."[80]

Justice Roberts's majority opinion, however, did not discuss Frederick's concern for First Amendment rights; rather the opinion claimed that "the best Frederick [could] come up with is that the banner [was] 'meaningless and funny'"[81] and that his goal was to get on television.[82] Moreover, the Court asserted that his motivation was of no consequence, as what truly mattered was that the banner could plausibly be interpreted as displaying a pro-drug message.[83]

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73. *Morse*, 127 S. Ct. at 2622–23.

74. *Id.* (quoting Juneau School Board Policy number 5520).

75. *Id.* (quoting the Juneau School District Superintendent).

76. *Id.* (quoting the Juneau School District Superintendent).

77. *Id.* (quoting the Juneau School District Superintendent).

78. Respondent's Brief at 1–2, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 579230.

79. *Id.* at 2 n.1.

80. *Justice Talking: Does Free Speech Stop at the Schoolhouse Door?* (National Public Radio Broadcast Apr. 30, 2007) [hereinafter *Justice Talking*] (transcript available at http://www. justicetalking.org/transcripts/070430_bonghits_transcript. pdf).

81. *Morse*, 127 S. Ct. at 2625.

82. *Id.*

83. *Id.*

The Court accepted the superintendent's argument that this was not political speech and that the school had more than a "mere desire to avoid the discomfort and unpleasantness . . . of an unpopular viewpoint," and thereby it distinguished the case from *Tinker*.[84] The Court further found that *Fraser* stood for two principles: students in school do not have constitutional rights on par with those of adults,[85] and, since the *Fraser* Court allegedly "did not conduct the 'substantial disruption' analysis prescribed by *Tinker*," the requirement of a "substantial disruption" is not necessary in all instances to uphold school action in controlling student speech.[86]

The Court cited *Vernonia* for the notion that deterring drug use by schoolchildren is an "'important—indeed, perhaps compelling' interest"[87] and that drug use poses a danger "far more serious and palpable"[88] than the danger at issue in *Tinker*.[89] The Court reasoned that—in light of this compelling interest cited by the school district, to which the Court should accord deference–the actions taken by Principal Morse were justified; since she reasonably interpreted the banner as promoting illegal drug use in violation of school policy, she could prevent the dissemination of its message.[90]

2. Campaign Speech

The Supreme Court has also found that the government has an interest in regulating speech pertaining to campaigns for political office.[91] The basis for this assertion of power is found in the Constitution.[92] Additionally, such speech pertains to a

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84. *Id.* at 2626 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

85. *Id.*

86. *Id.* at 2627.

87. *Id.* at 2628 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

88. *Id.* at 2629.

89. *Id.* The *Tinker* Court found the school was motivated by a desire to avoid unpleasant disputes. *Id.* at 2626 (quoting *Tinker*, 393 U.S. at 509).

90. *Id.*

91. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2672 (2007) (discussing the important governmental interest in preventing campaign corruption); Buckley v. Valeo, 424 U.S. 1, 18 (1976) ("[T]he government may adopt reasonable . . . regulations . . . in order to further an important governmental interest unrelated to the restriction of communication.").

92. *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

government activity, and the government has a greater interest in regulating the dissemination of information relating to electioneering than it would, say, in regulating speech purely concerning political issues.[93]

When the government attempts to control speech concerning political issues, the courts are quick to declare such regulation to be a control of content and therefore unconstitutional.[94] The government's efforts have been largely limited to controlling purely political speech—i.e., "vote for X."[95] The difficulty is that speech concerning political issues and speech meant to promote a candidacy often overlap, making it difficult to draft legislation that both is effective and withstands the test of constitutionality.

Another issue the courts have faced is the act of spending money to fund speech—whether in the form of a contribution or an expenditure.[96] They have found spending money to fund speech to be protected as a "speech act."[97] At the same time the Court has expressed concern about the spending by corporations, organizations, and other non-natural individuals, and the impact that such "immense aggregations of wealth"[98] can have on the political process.[99] However, while the state may also have a viable interest in preventing the distortion of speech—that is, that the speech of the moneyed will drown out that of individual citizens—the courts have largely rejected that concern and instead recognized a significant interest in controlling corruption and the appearance thereof.[100]

a. Precedent: Buckley, Massachusetts Citizens for Life, Austin *and* McConnell

In 1907, Congress began regulating monetary contributions

93. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (noting that the state can legitimately limit campaign expenditures by corporations to prevent unfair elections but cannot prevent corporations from expressing political views).

94. *See* FARBER, *supra* note 19, at 29 ("[The Court] disapproves most intensely of viewpoint discrimination.").

95. *See Buckley*, 424 U.S. at 41–44; FEC v. Mass. Citizens for Life, 479 U.S. 238, 249 (1986).

96. *See, e.g.*, *Buckley*, 424 U.S. at 45–47. "Expenditures" are monies spent *on behalf* of a candidate—i.e., advertisements paid for and run by a third party. *Id.* "Contributions" are funds *given* to a candidate. *Id.*

97. *See id.* at 51.

98. *Austin*, 494 U.S. at 660.

99. *See, e.g.*, *id.*; McConnell v. FEC, 540 U.S. 93, 115–22 (2003).

100. *See Buckley*, 424 U.S. at 47–49.

by corporations to elections;[101] in later years, that regulation was extended to contributions made by labor unions.[102] While such entities could not give money directly from their general purpose treasuries, they could establish political action committees ("PACs"), which are highly regulated, segregated funds set aside for the purpose of political advocacy.[103] The Federal Election Campaign Act ("FECA") of 1971[104] was enacted in an attempt to close a loophole exploited by groups that, unable to donate money directly and unwilling to submit to the regulations imposed by the PAC system, chose to make expenditures on behalf of campaigns.[105] While maintaining the distinction between expenditures and contributions, FECA imposed limits on both.[106] FECA limited the amounts of allowable expenditures and contributions, and it also mandated disclosure of information concerning the nature of both.[107]

The constitutionality of FECA was challenged in *Buckley v. Valeo*.[108] In that decision, the Court first held that political contributions and expenditures are speech, not conduct, and they are therefore protected by the First Amendment.[109] Further, any regulation of these "speech acts" must be closely drawn to fit the government interest in reducing corruption and appearance of corruption in federal elections.[110] Notably, FECA defenders had argued that the law was in the public interest since it would equalize the voices of the moneyed with those of ordinary citizens.[111] The Court was openly hostile to this suggestion, stating "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment."[112]

While upholding FECA's limitations on contributions generally,[113] the Court rejected some of the Act's provisions

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101. *See* FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2690 (2007).

102. *See id.*.

103. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 401–04 (1972).

104. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431 (2000)).

105. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2690–91.

106. *See* Buckley v. Valeo, 424 U.S. 1, 7 (1976).

107. *See id.*

108. *Id.*

109. *Id.* at 16.

110. *Id.* at 25–26.

111. *Id.* at 48.

112. *Id.* at 48–49.

113. *Id.* at 46–47. The Court distinguished contributions from expenditures,

governing expenditures.[114] Of special note is that it rejected a provision placing a dollar limit on expenditures concerning a clearly identified candidate.[115] However, the Court was still concerned that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application,"[116] and it sought to avoid the hindrance of pure issue advocacy since that would pose a "significant encroachment on First Amendment rights."[117] Therefore, the Court limited the disclosure requirement to expenditures on advertisements that "include explicit words of advocacy of election or defeat of a candidate,"[118] such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' . . . 'vote against,' 'defeat,' [and] 'reject.'"[119] These words would come to be known as the infamous "magic words" marking an ad as advocacy.[120]

In *Federal Election Commission v. Massachusetts Citizens for Life*,[121] the Court again confronted the issue of expenditures.[122] The Court addressed an instance where the name of a candidate was not directly tied to such magic words; instead, the advertisement urged readers to vote pro-life in an upcoming election and then listed the names of pro-life candidates.[123] The Court noted that its purpose in *Buckley* was to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons,"[124] and it held that, since this ad was only "marginally less direct" than a blatant message of "vote for X" of the latter category,[125] it was subject to the FECA disclosure requirements.[126]

Massachusetts Citizens for Life dealt with issues concerning disclosure as well as the legality of expenditures, whereas in

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approving of limits on the former because donations to a candidate do not limit the contributor's ability to speak per se; moreover, the Court recognized that a quid pro quo between a candidate and a donor, whether actual or merely perceived, was not in the interest of the democratic system. *Id.*

114. *See id.* at 51, 54, 58.

115. *Id.* at 51.

116. *Id.* at 42.

117. *Id.* at 64.

118. *Id.* at 43.

119. *Id.* at 44 n.52.

120. *See* FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2667 (2007) (referencing the *Buckley* "magic words").

121. FEC v. Mass. Citizens for Life, 479 U.S. 238, 243 (1986).

122. *Id.*

123. *Id.*

124. *Id.* at 249.

125. *Id.*

126. *Id.* at 249–50.

Austin v. Michigan Chamber of Commerce,[127] the Court limited itself to the question of the constitutionality of state limitations on expenditures.[128] It upheld a Michigan law prohibiting nonprofit corporations that accepted donations from for-profit corporations from making campaign expenditures directly from their treasuries.[129] While distinguishing its holding from that in *Massachusetts Citizens for Life*—in part based on the nature of the organization intending to expend funds[130]—the Court for the first time found a compelling state interest in controlling the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[131] Since the Michigan law was not an absolute ban on spending because corporations could still legitimately use PACs for expenditures, it was narrowly tailored to serve this interest.[132] Further, the law was held to be an apt resolution of a valid concern that corporations could circumvent state regulation of funds by donating to nonprofit organizations, which could then make campaign expenditures.[133]

However well-intentioned FECA may have been, as Justices Stevens and O'Connor later noted, "[m]oney, like water, will always find an outlet."[134] In 2002, Congress took steps to address the new ways that organizations were getting around campaign finance limits and other rules.[135] The Bipartisan Campaign Reform Act ("BCRA")[136] strengthened FECA in several ways, but of special importance to this discussion is Section 203 of the BCRA. That section prohibited any incorporated body from using general treasury funds to pay for an "electioneering communication."[137]

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127. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 652 (1990).

128. *Id.* at 654.

129. *Id.* at 668–69.

130. *Id.* at 662–64. Massachusetts Citizens for Life was a pro-life organization with the express purpose of advocating for political change, and it did not accept donations from business corporations. *Id.* In *Austin*, the group intending to make expenditures was a chamber of commerce, comprised in large part of corporations and with interests that included the economic benefit of its constituent business members. *Id.*

131. *Id.* at 660.

132. *Id.*

133. *Id.* at 664–65.

134. McConnell v. FEC, 540 U.S. 93, 224 (2003).

135. *See id.* at 132–33.

136. Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81.

137. *McConnell*, 540 U.S. at 189. The BCRA amended FECA's original disclosure requirements for individuals by extending those requirements to

The constitutionality of the BCRA and its specific provisions concerning electioneering communications were addressed by the Court in its lengthy decision in *McConnell v. Federal Election Commission*.[138] The electioneering communications provision was challenged because, some maintained that, *Buckley* had drawn "a constitutionally mandated line between express advocacy and so-called issue advocacy, and . . . speakers possess an inviolable First Amendment right to engage in the latter category of speech."[139] The Court rebuffed this attack, noting that the limitation to express advocacy in *Buckley* was "the product of statutory interpretation rather than a constitutional command"[140] meant to avoid problems of overbreadth and vagueness.[141] Declining to draw a bright line between express advocacy and so-called issue advocacy, the Court noted that "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad."[142] The Court found that *Buckley*'s express advocacy line "has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws that it found in the existing system."[143]

The Court also noted that the definition of an electioneering communication under the BCRA was "both easily understood and objectively determinable,"[144] and it in no way raised *Buckley* vagueness concerns. The court held that "the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections *are* the functional equivalent of express advocacy"[145] and that the "justifications for regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect."[146] As such, the Court determined that the law on its face was constitutional.[147]

However clear the *McConnell* Court was about the facial constitutionality of the BCRA provision governing electioneering

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corporations and unions and including all "electioneering communications." Pub. L. No. 107-155, §§ 201–04, 116 stat. at 88 (2002).

138. *McConnell*, 540 U.S. at 132–34.

139. *Id.* at 190.

140. *Id.* at 191–92.

141. *Id.* at 192.

142. *Id.* at 193.

143. *Id.* at 193–94.

144. *Id.* at 194.

145. *Id.* at 206 (emphasis added).

146. *Id.*

147. *See id.*

campaigning, in a footnote to the opinion the majority noted that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."[148] While this language could be considered mere dictum, this footnote ultimately opened the door to an "as-applied" challenge.

b. Federal Election Commission v. Wisconsin Right to Life, Inc.

Wisconsin Right to Life, Inc. ("WRTL"), a nonprofit corporation[149] that accepted corporate donations[150] sought to run ads that exhorted Wisconsin citizens to contact their Democratic Senators Russ Feingold and Herb Kohl to tell them to "oppose the filibuster" of judicial nominees.[151] These ads were to run less than thirty days prior to the election for Senate in which Feingold was running as incumbent, were directed at voters in his district, and clearly named Senator Feingold.[152] Therefore, these ads met the definition of "campaign electioneering" per the BCRA.[153] WRTL sought declaratory and injunctive relief to run the ads, suing the Federal Election Commission ("FEC") in federal court.[154]

A federal district court denied the injunction, stating that *McConnell* left "no room for the kind of 'as applied' challenge Wisconsin Right to Life, Inc. propound[ed]."[155] On appeal, the Supreme Court remanded the case to the district court, stating that *McConnell* in fact did not preclude such a challenge and, therefore, review of the BCRA as applied to the ads in question could take place.[156] On remand, the lower court took the Supreme Court's decision to mean that it must limit its review to the "four corners" of the ads, and in so narrowly construing its mandate, concluded that the ads were not the functional equivalent of express advocacy but rather "genuine issue ads."[157] The FEC and intervenors appealed to the Supreme Court, which set the matter for briefing and argument.[158]

In analyzing the merits of the challenge, the Court first noted

148. *Id.* at 206 n.88.
149. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2660 (2007).
150. *Id.*
151. *Id.* at 2660–61.
152. *Id.*
153. *See id.* at 2660, 2698 n.13.
154. *Id.* at 2661.
155. *Id.* (citations omitted).
156. *Id.*
157. *Id.* at 2662.
158. *Id.*

that, regardless of whether the ads were issue ads or express advocacy, the ads necessarily constituted political speech.[159] Being political speech, strict scrutiny must apply, and the government had to prove that the BCRA was narrowly tailored to protect a compelling interest.[160] *McConnell* had held that in the context of express advocacy the BCRA required strict scrutiny.[161] The question here was whether WRTL's ads constituted express advocacy or its functional equivalent, thereby falling within its purview.[162]

The Court found that the ads constituted neither express advocacy nor its functional equivalent.[163] The FEC argued that *McConnell* held that "the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy" and that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect."[164] Yet, Chief Justice Roberts stated that "*McConnell*'s analysis was grounded in the evidentiary record before the Court,"[165] and he said that *McConnell* did not require a test for determining whether an ad was the functional equivalent of express advocacy.[166] Roberts further asserted that *Buckley* had precluded the test that some maintained had been articulated by *McConnell* by rejecting an "intent-and-effect" test, and thus any test that depended on a speaker's intent would be invalid.[167] The Court then developed its own test: "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[168] Applying this new test to the ads at bar, the Court held that the ads' content was "consistent with that of a genuine issue ad" in that they focused on an issue and asked the public to contact their representative about that issue,

159. *Id.* at 2663–64 (noting that the ads were within the scope of BCRA's application to political speech).

160. *Id.* at 2664.

161. *Id.*

162. *Id.*

163. *Id.* at 2655.

164. *Id.* at 2664 (quoting McConnell v. FEC, 540 U.S. 93, 205–06 (2003)); *see supra* text and accompanying notes 145–46.

165. Wis. Right to Life, Inc., 127 S. Ct. at 2664.

166. *Id.* at 2665.

167. *See id.*

168. *Id.* at 2667.

did not overtly mention an election, and did not expressly address the fitness of a candidate for office.[169]

The Court refused to accept the argument of the FEC and intervenors that the context of the ads demonstrated that the ads were indeed the functional equivalent of express advocacy because the Court had already designed a new test that expressly ignored intent and effect.[170] Thus, that the ads purported to be concerned with votes on judicial nominees but did not coincide with those votes, and instead coincided with an election, was found to be of no consequence.[171] Likewise, the Court considered the following facts irrelevant: the ads ostensibly urged voters to contact Feingold, they failed to provide any contact information for him, and they instead listed a website that expressly urged voting against Feingold.[172] What mattered to the Court was that the ads could *possibly* be construed as issue ads, not express advocacy. Stating that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor,"[173] the Court held that the interest in protecting speech that may be interpreted as something other than express political advocacy dictated that any ad susceptible of an "issue ad" interpretation be given the benefit of the doubt, and therefore be deemed not to be the functional equivalent of express advocacy.[174]

Having determined that the ad was not express advocacy or the functional equivalent thereof, the Court went on to apply strict scrutiny.[175] The Court considered whether the government's interest was compelling and, if so, whether the BCRA was narrowly tailored to address that interest.[176] This question was easily answered: since only express advocacy would give rise to what the Court had deemed to be a compelling interest (i.e., concerns about corruption or the appearance thereof), and these ads were not express advocacy or its equivalent, the government naturally could have no interest in regulating these ads.[177]

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169. *Id.*

170. *See id.* at 2669 (stating that, based on the new standard, these contextual issues should seldom play a role in the inquiry).

171. *See id.* at 2668 (stating that running the ads near an election is unremarkable).

172. *Id.* at 2668–69.

173. *Id.* at 2669.

174. *See id.* at 2669 ("Discussion of issues cannot be suppressed simply because the issue may also be pertinent in an election.").

175. *Id.* at 2671.

176. *Id.* at 2672.

177. *Id. at* 2671. *Austin*'s recognition of a compelling interest in the impact on elections of "corrosive and distorting effects of immense aggregations of wealth"

Although it found the BCRA as applied to be unconstitutional, Chief Justice Roberts's opinion did not purport to overrule *McConnell*. However, seven of the nine justices interpreted the opinion as overruling *McConnell*. In his concurrence, Justice Scalia urged that it would have been better to overrule the holding even in the face of stare decisis.[178] In his dissent, Justice Souter opined that "the principal opinion institute[s] the very same standard that would have prevailed if the Court formally overruled *McConnell*" and therefore, *McConnell* was effectively overruled.[179]

II. *Wisconsin Right to Life, Inc.* and *Morse*: Defining Terms to Meet Set Ends

In both *Wisconsin Right to Life, Inc.* and *Morse*, the Court began with certain premises that necessitated the resulting holdings. Those premises were questionable at best, and perhaps biased. Upon determining that *Morse* was not a case of political speech, the Court determined that the *Tinker* protections did not extend to Frederick. Under a new test that it created wholesale, the *Wisconsin Right to Life, Inc.* Court held the BCRA unconstitutional as applied to the ads in question. The facts in these cases and the relevant precedent did not logically lead to either determination. Rather, the Court used faulty initial assumptions to extrapolate erroneous conclusions. By defining the contours of the question, the Court reached conclusions that are troubling, especially because they are of the ilk typified by "conservative" Courts in the past.[180] Given the new constitution of the Roberts Court,[181] it would be reasonable to suspect that the

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and its impact on elections was dismissed on the same basis. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 660 (1995).

178. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2687 (Scalia, J., concurring).

179. *Id.* at 2704 (Souter, J., dissenting).

180. *See generally* Harold J. Spaeth & Jeffrey A. Segal, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103 (1989) (empirically comparing decisions of the Warren and Burger Courts in terms of conservative versus liberal). The Burger Court is considered to be a "conservative" Court, whereas the Warren Court is considered "liberal." *Id.* *Wis. Right to Life, Inc.* ignores *McConnell*, harkening back to Burger's *Buckley* opinion. *See* Wis. Right to Life, Inc., 127 S. Ct. at 2672. *Morse* supersedes the logic in Warren's *Tinker* opinion in favor of Burger's *Fraser* opinion. *See* Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007).

181. *See* John F. Basiak, *The Roberts Court and the Future of Substantive Due Process: the Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 864 (2007). Chief Justice Roberts and Justice Samuel Alito have replaced Chief Justice Rehnquist and Justice O'Connor, respectively. Justice O'Connor was often considered the "swing vote." *Id.*

assumptions were borne at least in part in the hope of creating new law—a conservative twist on judicial activism.[182] Indeed, those not in the majority in both cases asserted that the Court's holdings were either a perversion of precedent or actually an overruling of it.[183]

A. The Faulty Logic in Wisconsin Right to Life, Inc.

Congress designed the BCRA to close a loophole that had previously allowed corporations and unions to directly run ads that advocated a stance in an election without using "magic words" of express advocacy, such as "vote for" or "elect X."[184] While an ad that used such words was clearly express advocacy, by avoiding those "magic words," it was possible to disguise an ad intended to advocate as an "issue ad."[185] As such, corporate and union advocates could pay for ads directly from their treasuries and circumvent the PAC requirement by avoiding such overt calls to vote for or against a candidate.[186]

The BCRA clearly defines what "campaign electioneering" was curtailed under the law.[187] Per the BCRA, 1) a "broadcast, cable, or satellite communication" 2) that clearly identifies a candidate for federal office, 3) is targeted to the voters in that candidate's district and 4) runs within a set span of time prior to an election may not be funded through corporations' general treasuries.[188]

The *McConnell* Court approved of the BCRA definition, finding it easily understood, objective, and constitutional as applied to express advocacy or its functional equivalent.[189] Per *McConnell*, advocacy would constitute such a functional equivalent if it "intended to influence the voters' decisions and have that effect."[190] However, Chief Justice Roberts opined that *McConnell*

182. *See* Seth Rosenthal, *Fair to Meddling: The Myth of the Hands-Off Conservative Jurist*, SLATE, June 27, 2006, http://www.slate.com/id/2144202/ (last visited Mar. 25, 2008) (arguing that Justices Roberts and Alito are not, in fact, hands-off jurists but are rather judicial activists).

183. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2684 (Scalia, J., concurring in part) ("[T]his faux judicial restraint is judicial obfuscation . . ."); *id.* at 2699 (Souter, J., dissenting) ("*McConnell*'s holding . . . is overruled.").

184. *See id.* at 2695 (Souter, J., dissenting).

185. *Id.*

186. *See id.* at 2693.

187. Federal Election Campaign Act, 2 U.S.C. § 431 (2000).

188. *Id.*

189. *See* McConnell v. FEC, 540 U.S. 93, 204–05 (2003) (finding no distinction between express advocacy and "so-called issue advocacy").

190. *Id.* at 206.

had been limited to the abstract question of whether the BCRA could prohibit a certain type of ad and denied that the case had established a standard that could be applied to actual ads, such as those at bar.[191]

Strangely, even as the Court stated that *McConnell* was an analysis of an abstract question of constitutional law, it asserted that the *McConnell* analysis was "grounded in the evidentiary record" presented in that case.[192] As the dissent noted, the Chief Justice cited no authority for this assertion other than WRTL's brief in the case and a misrepresentation of *McConnell*'s appellate record.[193] But, by making this unsupported assertion, Justice Roberts was able to supersede *McConnell's* intent-and-effect test for determining if the ad is the functional equivalent of express advocacy. He went back to the 1976 decision in *Buckley*—the very decision that created the "magic words" loophole that the *McConnell* Court expressly plugged when it upheld most of the BCRA.[194] In stating that *Buckley* and not *McConnell* governed, Roberts cited the former for the proposition that an intent-and-effect test would not provide a safe harbor for free speech because a subjective determination of what constituted advocacy would subject some genuine issue ads to restrictions.[195] With a broad sweep of the pen, Chief Justice Roberts effectively overruled the plain *McConnell* endorsement of an intent-and-effect test even as he purported to uphold the decision.[196]

Having disposed of precedent, Roberts continued by pulling a new test for determining the functional equivalent of express advocacy out of thin air.[197] Addressing the appropriate

191. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2661 (noting the Supreme Court's prior holding that *McConnell* "did not purport to resolve future as-applied challenges").

192. *Id.* at 2664.

193. *Id.* at 2700 n.18. In *McConnell v. FEC*, District Court Judge Henderson did not herself assert that the core evidence in the case was the studies cited; rather, she *quoted* this assertion in passing, saying that "[a]ccording to the [studies' proponents] the . . . reports were 'the central piece of evidence marshaled by defenders of' [BCRA.]" 251 F. Supp. 2d 307, 308 (D.D.C. 2003). The Chief Justice therefore misrepresented the record to the degree that he used this quote without noting that it itself was a quote, not a judicial finding. *See id.*

194. *See* McConnell v. FEC, 540 U.S. 93, 193 (2003) (explaining that a rigid border should not be defined for these ads).

195. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2665 (citing Buckley v. Valeo, 424 U.S. 1, 43 (1976)).

196. Indeed, all Justices other than Roberts and Alito noted that *McConnell* is effectively overruled. *See* opinions cited *supra* note 183.

197. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2699 (Souter, J., dissenting) (arguing that the Chief Justice's test is contrary to *McConnell*).

considerations for such a test, he said that it must provide a safe harbor for free expression, and it should "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'"[198] His new test would focus on the content of the ad rather than on "amorphous" considerations of intent and effect.[199] He then pronounced that an ad was to be considered the functional equivalent of express advocacy only if "susceptible of *no reasonable interpretation other than* as an appeal" to vote in a certain way.[200]

If the analysis of so-called "issue ads" is limited to their four corners, virtually no ads would be determined to be the functional equivalent of express advocacy because they are specifically designed to avoid magic words. Therefore, regardless of their true purpose or effect, they necessarily *could* be interpreted as something other than express advocacy.[201] Indeed, *McConnell* explained that ads that refrain from explicitly exhorting the electorate to vote for a particular candidate are considered to be more effective than those that do.[202] Even if an organization was not trying to circumvent campaign law, the organization may in fact prefer to cloak its advocacy as an issue ad. If an ad appears to advocate for an issue rather than for or against a candidate, it seems more credible to viewers.[203] Effective as these ads are, they have become endemic, and they are the very evil that the BCRA had attempted to root out.[204] By overruling *McConnell* and creating a new test that does not look at intent or effect, the Roberts Court in *Wisconsin Right to Life, Inc.* has effectively returned the nation to the *Buckley* days, thwarting the will of Congress to address a compelling public need.[205]

It is clear that the ads in *Wisconsin Right to Life, Inc.* fell under the BCRA standard. They mentioned a candidate, were directed toward the appropriate audience of voters, were run during the blackout period, and were funded through WRTL's

198. *Id.* at 2665 (majority opinion) (internal citations omitted).

199. *Id.* at 2666.

200. *Id.* at 2666 (emphasis added).

201. *Id.* at 2702 (Souter, J., dissenting).

202. *See* McConnell v. FEC, 540 U.S. 93, 127 (2003) (outlining the record relating to persuasiveness of ads).

203. *See id.*

204. *See id.* at 193 (establishing that similar criteria governs ads with and without magic words).

205. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2702 (Souter, J., dissenting) (stating that the BCRA was enacted to stop the need for magic words).

treasury, not its PAC.[206] However, they did not contain the magic phrase "vote against Feingold," and so, under the new *Wisconsin Right to Life, Inc.* test, the ads did not constitute the functional equivalent of express advocacy. But looking beyond form to intent and effect, it is clear that WRTL's aim was to encourage Wisconsin citizens to cast a vote against Russ Feingold.[207]

The ads concerned the filibuster of judicial nominees—an issue that was not of pressing concern at the time of the proposed airing because Congress was in recess, and therefore no nominees were up for approval.[208] The Senate election was of pressing concern at the time. WRTL's ads were clearly attempting to influence votes, not weigh in on an issue.[209] Additionally, the ads told voters to contact Senator Feingold to encourage him to refrain from filibustering, but they gave no contact information for him.[210] Instead, the ads gave WRTL's website address, which contained plainly partisan messages exhorting voters to vote against the Senator.[211] Only by looking to context can the true nature of a political ad be discerned.[212] One would expect context to be of special importance in an as-applied challenge, such as *Wisconsin Right to Life, Inc.* Roberts noted that the line between issue ads and advocacy is often fuzzy,[213] yet nonetheless blithely chose to ignore the reality that these ads were of the latter ilk. He effected his purpose to overcome the BCRA by creating a test that ignores context entirely. This was a formalistic analysis that perverted precedent and reality, thereby thwarting the will of Congress. It can only be called judicial activism.

Wisconsin Right to Life, Inc. recognized that the state has a compelling interest in preventing corruption and the appearance thereof.[214] It further recognized that a restriction on political speech can be implemented only if it is narrowly tailored to further a compelling interest.[215] Notably, it also asserted that the Court saw no reason to regulate ads that are issue ads, i.e., "that are

206. *Id.* at 2660–61 (majority opinion).
207. *Id.* at 2697–98 (Souter, J., dissenting) (discussing WRTL's public views on candidates).
208. *Id.* at 2698.
209. *Id.*
210. *Id.*
211. *Id.*
212. *See id.* at 2702 (arguing that context is central to the meaning of an ad).
213. *Id.* at 2659 (majority opinion).
214. *Id.* at 2672.
215. *Id.* at 2671.

neither express advocacy nor its functional equivalent."[216] But why would it? *Pure* issue ads are not meant to sway voters towards a particular candidate; they discuss issues, not elections. However, Roberts erroneously found that WRTL's ads were issue ads.[217] The necessary conclusion is that the state can have no compelling interest in regulating those ads. Having created a formalistic test that no electioneering communication guised as an issue ad could fail to pass, all such issue ads are no longer considered advocacy.[218] The state has no interest in regulating ads that are not advocacy, and thus the BCRA provisions are unconstitutional when applied to virtually all ads.[219] Roberts defined his terms and neatly fit them to his ends.

This was all too much for Justice Souter who, in a seething dissent, stated that the new test "stands *McConnell* on its head."[220] Justice Souter noted that the dicta in *McConnell* allows for the possibility of "'genuine' or 'pure'" issue ads to which an application of the BCRA may be unconstitutional.[221] Justice Souter stated that the *McConnell* Court "meant that an issue ad *without campaign advocacy* could escape the restriction."[222] It is not whether an ad is capable of interpretation as an *issue ad* that is determinative, but rather, whether it is capable of interpretation as *advocacy*.[223] If an ad can take on this meaning, it is not "genuine" or "pure;" *McConnell* dictates whether the application of the BCRA to such an ad is constitutional.[224] While Justice Souter agreed with the Chief Justice in interpreting case law to mean that the state has a compelling interest in regulating the functional equivalent of express advocacy,[225] he rejected Roberts's asserted need for a new test, and therefore used the *McConnell* impact-and-effect test.[226] Considering the contextual factors surrounding the ads at bar, Justice Souter concluded that the WRTL ads were the functional equivalent of advocacy, of the sort

216. *Id.*

217. *See id.* at 2673 (arguing that WRTL's ads are not express advocacy or its functional equivalent).

218. *Id.*

219. *Id.*

220. *Id.* at 2699 (Souter, J., dissenting).

221. *Id.*

222. *Id.* (emphasis added).

223. *Id.*

224. *Id.* (citing McConnell v. FEC, 540 U.S. 93, 206–07 (2003)).

225. *See id.* at 2696 (stating that it was understood that there was a compelling interest in limiting electioneering by corporations and unions).

226. *See id.* at 2701–02.

that the state had a compelling interest in regulating.[227]

Per the dissent, state concerns about corruption and resultant voter cynicism and apathy were well-founded.[228] Justice Souter gave a primer on the lengthy history of executive and legislative concerns about and attempts to control corruption by regulating campaign financing, emphasizing that this has been an endemic problem that had only worsened over the years.[229] He went on to cite empirical studies showing the public felt its votes have little if any importance.[230] For instance, most voters believe that their representatives will more often vote in the interest of those who donate to (or, presumably, make expenditures on behalf of) their campaigns rather than for the interest of their constituencies.[231] Additionally, he noted that *Austin* recognized another valid interest in campaign regulation: controlling the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[232]

The BCRA was narrowly tailored to meet the interest for which it was enacted. As the dissent notes, even with the BCRA limitations groups would have a wealth of options by which they could communicate their messages.[233] If a group wanted to run an ad during the blackout period, it could do any number of things to legitimize that action. It could pay for the ad through its PAC.[234] It could run it in media other than television.[235] And, if an ad was truly an issue ad, its sponsors could simply refrain from mentioning any candidate.[236] Alternatively, if a group wanted an ad to advocate for or against a candidate, run on television, and be paid for out of a corporation's general treasury, it could run the ad at any time other than the blackout period.[237]

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227. *See id.* at 2698.

228. *Id.* at 2688.

229. *See id.* at 2689–95.

230. *See id.* at 2688–89.

231. *See id.* (citing a poll finding that a large portion of Americans think congressional members cast votes based on their largest contributors).

232. *Id.* at 2696 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)). Note also that the majority opinion mentions the *Austin* factor, but it says that this factor would have no bearing on the ads at issue since they are not advocacy but rather issue ads. *Id.* at 2673.

233. *Id.* at 2703.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

Courts have previously recognized that campaign finance reform is an issue of special knowledge for Congress and that the judiciary should afford the legislature due respect in such decisions by only overruling a promulgated law concerning campaign finance reform if the law is truly abhorrent to the Constitution.[238] Chief Justice Roberts implied that this was a close issue to decide.[239] To take him at his word, but still see that he does not defer to the legislature's special expertise and compelling interest in fighting corruption, one must conclude that *Wisconsin Right to Life, Inc.* itself is "susceptible of no reasonable alternative"[240] than that it is representative of the Roberts Court's own unique strain of judicial activism.

Thus, the Roberts Court has effectively returned the country to the status quo before the BCRA; Justice Souter wryly notes, "the same toothless 'magic words' criterion of regulable electioneering that led Congress to enact BCRA in the first place" has been reinstated.[241] By cloaking campaign electioneering in the sheep's clothing of issue ads, groups can again channel funds through their general treasuries and thereby avoid the restrictions applicable to PACs. The Court has inverted reality to create a convenient truth, reasoning formalistically to overrule precedent while supposedly upholding the principle of stare decisis. In short, these election finance loopholes that Congress intended to close have been teased back open again.

B. The Faulty Logic in Morse

In *Morse,* the Court ultimately reached an erroneous holding in the same way that it did in *Wisconsin Right to Life, Inc.*, by using a questionable premise to circumvent precedent. In *Morse*, the Court determined that Frederick's banner was in-school non-political speech, and therefore, the requirements articulated by *Tinker* did not necessarily apply.[242] As such, the Court stressed the need articulated in *Fraser* to defer to the interest of schools in inculcating proper values even if that means censoring student speech.[243]

Chief Justice Roberts attempted to parse the meaning of

238. *See id.* at 2705 (recognizing Congress's authority to protect the integrity of elections).

239. *See id.* at 2669 (referring to "a tie" between speaker and censor).

240. *See id.* at 2667.

241. *Id.* at 2702 (Souter, J., dissenting).

242. *See* Morse v. Frederick, 127 S. Ct. 2618, 2624 (2007).

243. *Id.* at 2626.

"BONG HiTS FOR JESUS" and found two probable interpretations: an imperative ("do bong hits") or a "celebrat[ion] of drug use."[244] Therefore, he found it reasonable for Principal Morse to have interpreted it as promoting drug use.[245] While saying that the banner can be seen as promoting drug use, Roberts maintained that it was not political speech.[246] Without citing authority, Roberts asserted that the student himself had not argued that the banner had a political message and that it was not political speech.[247]

Concededly, Frederick said that his goal was to "get on television."[248] But he also noted his interest in asserting his First Amendment rights and cited the belief that if "you don't use them, you lose them," as being an important factor in his actions.[249] While he arguably did not have a message regarding a particular topic—e.g., Christ or marijuana—his actions could be construed as political because they were a conscious exercise of his political right to speak freely. Moreover, it is difficult to see how a banner—traditionally the tool of the political advocate—that mentions illegal drug use could *not* somehow be susceptible to an interpretation as political speech. If Frederick was advocating the use of marijuana, then that itself could arguably be political speech, protesting the "war against drugs."[250]

As Justice Stevens noted in his dissent, the legalization of marijuana has been at the forefront of Alaskan politics since the 1970s when the state supreme court decriminalized the possession of relatively small amounts of the drug for personal use.[251] A decade before Frederick made his statement, a referendum vote had recriminalized possession,[252] but in 1998, voters approved the use of marijuana for medicinal purposes.[253] It would be very unlikely that a mere four years later the subject of marijuana use had become entirely moot. At the very least, Frederick's message could be just as susceptible to being interpreted as a political statement on drugs as one promoting or celebrating their use.[254]

244. *Id.* at 2625.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Justice Talking*, *supra* note 80, at 6.
250. *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting).
251. *Id.* at 2650 n.8 (citing Ravin v. State, 537 P.2d 494, 501 (Alaska 1975)).
252. *Id.*
253. *Id.*
254. This interpretation seems especially apt given Frederick's prior history of

However, again with no authority, Roberts concluded that Frederick's message was "plainly not a case" of discussion of the merits of the legalization of marijuana.[255]

At the same time that he opined Frederick's banner could be seen as promoting drugs, Roberts agreed that it could be seen as silly, nonsensical, or funny.[256] But it is unfair to summarily dismiss a message that is silly as non-political. Dada was a recognized art movement that promoted the absurd and incomprehensible, but it was also a forceful statement about the bleakness of its times.[257] In contemporary culture, the "pranking" humor of the kind employed by Frederick cannot be dismissed as non-political simply because it is silly.[258]

Roberts also made no principled distinction between mentioning drug use, advocating its use, and discussing its legality. Justice Breyer's partial concurrence said as much when it noted that if Frederick had chosen his words just slightly differently, i.e., to say "LEGALIZE BONG HiTS," it would have been construed as political speech and therefore accorded a higher level of protection.[259] By erroneously asserting that Frederick's message was not political or that it was possibly interpreted as political, the Chief Justice was able to supersede the Warren Court's *Tinker* decision in favor of Burger's *Fraser*. He distinguished the situation at bar from that in *Tinker*, where the Court found that the school attempted to stifle speech just because it wanted to avoid the problems associated with the free expression of controversial ideas.[260] The danger of Frederick's "pro-drug" message was more akin to that in *Fraser* since it was against school policy and it was also against the school district's justifiable public interest in deterring drug use among high school

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school protest and apparent political astuteness. *See supra* text accompanying notes 78–79.

255. *Morse*, 127 S. Ct. at 2625.

256. *See id.* at 2624–25.

257. *See* Sascha Bru, *Dada as Politics*, 41 ARCADIA—INT'L J. LITERARY STUD. 296, 298 (2006) ("Dada . . . manifestly articulated itself with and responded to the . . . trauma of the Great War.").

258. *See* Christine Harold, *Pranking Rhetoric: "Culture Jamming" as Media Activism*, 21 CRITICAL STUD. IN MEDIA COMM. 189, 194 (2004) (differentiating between parodists, who explicitly employ rhetoric devices as satire, on the one hand, and pranksters, who are comedians that recognize some situation and "try something to see what responses they can provoke," on the other).

259. *See Morse*, 127 S. Ct. at 2639 (Breyer, J., concurring in part and dissenting in part).

260. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (explaining that school officials must show more than discomfort to suppress expression).

students.[261]

It was convenient for Justice Roberts to elevate the ideals protected by the *Tinker* students over those represented in *Morse*, and he did so to further stigmatize Frederick's message as simultaneously non-political and dangerous. He characterizes *Tinker* as a "silent, passive expression of opinion" against the Vietnam War that posed no threat to school discipline[262] but Frederick's banner as posing a danger "far more serious and palpable"[263] than that in *Tinker* because it could be interpreted as promoting drug use, which the school has an "important[,] . . . perhaps compelling" interest in deterring.[264]

However, this view of relative dangers is inapt because it is retrospective. While the Vietnam War is now looked at with disfavor and protestors are largely seen as having been correct, protesting against the war in 1965 was seen by most as unpatriotic.[265] Had he been on the bench then, Chief Justice Roberts could have argued that the school district had a compelling interest in inculcating values that included respect for the government and its war in Vietnam. He could have also argued that the protest led to a palpable danger. The *Tinker* opinion noted that the protestors were harassed by other students who supported the war.[266] This could be said to have easily escalated into physical violence. Now, in the twenty-first century, the government is waging a war on drugs, which are characterized as dangerous and which the school district is said to have a viable interest in suppressing.[267] But, what distinguishes Frederick's silent banner from Tinker's black armbands?[268] By dismissing Frederick's message as non-political with little evidentiary backing and little explanation, Justice Roberts determined that

261. *Morse*, 127 S. Ct. at 2629.

262. *Id.* at 2626.

263. *Id.* at 2629.

264. *Id.* at 2628 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)). Note that *Vernonia* dealt with Fourth Amendment, not First Amendment, principles. *See supra* text accompanying note 69.

265. *See Morse*, 127 S. Ct. at 2650 (Stevens, J., dissenting) (noting that the dominant opinion at the time of *Tinker* regarded protest against the war as "unpatriotic, if not treason").

266. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

267. *Morse*, 127 S. Ct. at 2629 (characterizing drugs as dangerous and of legitimate concern to school adminstrators).

268. *Id.* at 2651 (Stevens, J., dissenting) (noting that alcohol was banned in his youth and that drinking "was condemned with the same moral fervor that now supports the war on drugs," that its illicit use was just as prevalent as contemporary use of marijuana and, informed by the experience of prohibition, we should be "wary of dampening speech" advocating the legality of drugs).

Tinker was not controlling and thereby opened the door for increased suppression of student speech.

The Court found the logic of *Fraser* to be persuasive.[269] The *Fraser* holding, like the main opinion in *Morse,* distinguished Fraser's "obscene" speech as non-political and found that *Tinker* did not control the ruling.[270] The *Morse* Court said that the holding in *Fraser* that the "[c]onstitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" was determinative.[271] The Court deferred to Principal Morse's judgment that the banner conveyed a dangerous pro-drug message, which reasonably could be suppressed.[272]

Indeed, Justice Roberts went on for a full five paragraphs about the dangers of drug use by schoolchildren and the need for schools to prevent drug use, even to the extent of repressing student speech.[273] This is strange given his refusal to defer to Congress's judgment about the need for campaign finance reform. By exaggerating the danger of marijuana in *Morse* but minimizing the danger of voter apathy and corruption in *Wisconsin Right to Life, Inc.*, the Roberts Court found it possible to justify deference to the opinion of a school principal but not to the judgment of the majority of the members of Congress.

III. Reconciling *Wisconsin Right to Life, Inc.* and *Morse*: Focusing on the Spirit of the First Amendment to Avoid Defeating It in Practice

In *Wisconsin Right to Life, Inc.*, Justice Roberts stated that regulation of speech is to be a measure of last resort with "the tie go[ing] to the speaker, not the censor."[274] The dissent in *Morse* rightly noted that this did not appear to be true in the case of Frederick's banner.[275] His message was at least as enigmatic as that in WRTL's issue ads. The majority responded to this criticism

269. *See id.* at 2627 (majority opinion) (noting that *Fraser* coexisted with *Tinker*).

270. *See id.* at 2626–27 (asserting that Fraser's speech was within the school context rather than outside in a political forum).

271. *Id.* at 2626 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

272. *See id.* at 2624–25 (agreeing with Principal Morse's inferences about Frederick's sign).

273. *Id.* at 2628–29.

274. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007).

275. *See Morse*, 127 S. Ct. at 2649 ("[I]f this were a close case, the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message . . .").

by reiterating its insistence that *Morse* was not a case of political speech and that speech rights are different when exercised by a student at school.[276] One is forced to wonder whether, given all the contingencies and questionable reasoning in both decisions, this explanation is not mere evasion. Ultimately, when dealing with First Amendment free speech issues, should not the tie always go to the speaker?

There is no tie in *Wisconsin Right to Life, Inc.*, but arguably there is in *Morse*. The meaning of the WRTL ads, properly judged by *McConnell* standards, is clear: they advocated against the election of Senator Feingold.[277] Conversely, the message of Frederick's banner in *Morse* could constitute a debate on the merits of drug criminalization, advocacy of free speech, or just simple silliness. When properly analyzed in terms of context and intent-and-effect, the meaning of the WRTL ads is much more clearly advocacy proscribed by the BCRA[278] than is Frederick's banner, a pro-drug message.

Morse and *Wisconsin Right to Life, Inc.* are governed by different precedent, but when speaking of the First Amendment, is that a viable distinction to excuse these holdings? These two cases implicate First Amendment free speech concerns, and they should be treated similarly, or at least in not such a divergent manner. The tie apparently goes to the speaker only when it suits the Court's ends.

Even more important, the speaker in *Morse* was an individual, not a corporation. Stripped of their special circumstances (student and corporate political speech), *Morse* and *Wisconsin Right to Life, Inc.* suggest that corporations can speak more freely than individuals under the current Supreme Court First Amendment doctrine. The rights of natural persons, whose interests include self-realization, should be afforded wider latitude in keeping with the greater interests at hand. First Amendment speech protections offered to non-natural entities should be limited. State-created entities should not have speech rights that trump those of real people, even if those people are high school students. The metaphor of "corporation as man" has been extended to the degree that not only are non-natural speakers given First Amendment protections on par to those afforded to individuals, but the fictitious persons' spending of money has come

276. *Id.* at 2627 n.2.
277. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2663.
278. *Id.*

to represent speech.[279] This strained metaphor has led to a transformation in our understanding of free speech rights—through each interpretation, a wider and wider net is cast as to what is protected speech.[280]

The free speech tradition favors more speech since more ideas mean a greater debate, which is in the public interest.[281] This is the model that has prevailed in our jurisprudence.[282] While the model was tenable when dealing with individuals speaking on street corners, we now have a situation where political corporations are afforded the same rights as those individuals, but are additionally able to spend far more than any one Bolshevik on a soapbox. The First Amendment has morphed into a shield that not only protects the individual with an unpopular idea—as it should vis-a-vis Frederick—but also the moneyed political corporation in *Wisconsin Right to Life, Inc.*[283] This tradition, which frames the argument as protection of the rights of the private sphere against government control is, at best, antiquated. The policy upon which it rests—opening the door to more speakers—is subverted in contemporary American Society by using the First Amendment as a shield.[284]

Conclusion

Being that political corporations are artificial entities, we should rightly understand the need to equalize the playing field so that all speakers, regardless of wealth, are able to speak loudly enough to be heard.[285] The metaphor of the "marketplace of ideas" strongly suggests that, as in any marketplace, some regulation is appropriate to avoid monopoly by those with the strongest voices,

279. *See* Berger, *supra* note 28, at 969–70 (discussing the relationship between spending and speech in terms of political campaigns); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1006 (1976) (discussing the relationship between campaign financing and the First Amendment).

280. *See* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 782 (1987) (noting that, despite the First Amendment's relatively limited reach as compared to substantive due process, more and more activities have been brought under its umbrella).

281. *See* Shi-Ling Hsu, *supra* note 29, at 108–09 (noting that both advocates and detractors of campaign finance reform appear to endorse the idea "that more speech is always better").

282. *See* Fiss, *supra* note 21, at 1405 (discussing the "Free Speech Tradition").

283. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992) (arguing the First Amendment's aim is to protect self-government).

284. *Id.*

285. *See* Fiss, *supra* note 280, at 788 (suggesting that the state should act to allow the public to hear voices that would otherwise be stifled).

i.e., the most money.[286]

The Supreme Court has repeatedly objected to the notion that equalization is necessary, or even desirable;[287] in the spirit of "the more speech, the better," it has overlooked the practical consequences of its focus on individual autonomy.[288] But autonomy should not be a means to an end in itself. Rather, it should serve the purposes famously articulated by Justice Brennan[289] and endorsed by the Roberts Court.[290] We no longer have all that many soapbox speakers.[291] Contemporary social structure is much more complex, and money is obviously of greater importance in terms of conveying a message.[292] By shifting the view of the government from being a censor of speech to a protector of speech and by guaranteeing individuals the right to speak at least as loudly as political corporations, the troublesome conclusions in *Wisconsin Right to Life, Inc.* and *Morse* could have been averted.[293]

For instance, had the Court duly considered its holding in *Austin*—that the government has a compelling interest in controlling the vast corporate wealth that has little connection with individual speakers[294]—it would have recognized that Congress has the right to control corporate voices, which are enabled to speak by the simple virtue of having money. Likewise, had it not so readily dismissed its *Tinker* standard in *Morse*, it would have protected the speech rights of individual students to air controversial ideas.

Rather than following these narrow tests, it would be most prudent to look to the end result when analyzing First Amendment rights: do proposed restrictions on speech further its fundamental purpose, or do they limit it? A political corporation

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286. *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 636 (1982) (noting the "truth-producing" capacity is not enhanced by such monopolization).

287. *See, e.g.*, *supra* text accompanying note 113.

288. *See* Fiss, *supra* note 21, at 1423; Wright, *supra* note 286, at 631–32.

289. *See* Berger, *supra* note 28, at 965 (discussing the "marketplace of ideas" concept).

290. *See* FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2673–74 (2007).

291. Fiss, *supra* note 21, at 1409.

292. *See* Fiss, *supra* note 21, at 1410; Wright, *supra* note 286, at 633 (discussing the impact of the Court's assertion that "money is speech").

293. *See* Magarian, *supra* note 22, at 103–04 (discussing the public-private distinction as important in guaranteeing individuals the autonomy they need to effectuate their rights).

294. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (holding that the state has a sufficiently compelling rationale to support its restriction on independent expenditures by corporations).

should not have unfettered speech rights in the political arena: spending money overwhelms other voices, thereby inhibiting free speech for those who do not have money. Likewise, the government should not be able to restrict the free speech of its citizens, regardless of their age or setting, without a compelling reason.